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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re YESENIA L., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

YESENIA L.,

Defendant and Appellant.

D051937

(Super. Ct. No. J215719)

APPEAL from an order of the Superior Court of San Diego County, Francis M.
Devaney, Judge. Affirmed as modified.

Yesenia L., a minor, admitted allegations that she committed burglary (Pen. Code, § 459), and the juvenile court thereafter placed her on probation with conditions, including that she pay \$139,669 in restitution jointly and severally for property damage and other losses resulting from a fire started by another minor participating in the burglary. Yesenia appeals from the restitution order, contending (1) the juvenile court

erred by ordering restitution for fire damage when she did not cause the fire and pleaded guilty to only burglary; (2) her due process rights were violated by the juvenile court's failure to consider circumstances such as her indigence, lack of prior offense and age; (3) the court erred by imposing a Welfare and Institutions Code section 730.5 fine without a finding of her ability to pay; and (4) the restitution order must be vacated as imposed without being alleged and found true beyond a reasonable doubt in accordance with *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). We modify the juvenile court's order to strike the \$119 Welfare and Institutions Code section 730.5 fine and otherwise affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND¹

In May 2007, San Diego Police Department detectives were assigned to investigate a fire at Memorial Middle Academy (the school) and through a witness identified three suspects, Yesenia, who was then 13 years old, Vicente O. and Jose B. Yesenia admitted to police that she and another minor, Edwin O. had entered a bungalow classroom through the window and began taking school supplies. According to Yesenia, Edwin lit a piece of paper to provide light but dropped it when it got too hot, starting a fire that spread quickly and became too large to extinguish. Yesenia and the others ran away.

¹ We take the underlying facts of the offense from the probation officer's social study report.

Yesenia admitted at an ensuing readiness hearing that "on or about May 17, 2007, . . . [she] did unlawfully enter Memorial Middle School [*sic*] with the intent to commit theft in that building which is a violation of Penal Code section 459[, subdivision (a)], a felony." She agreed the factual basis for her admission was that on that day, she entered the school with intent to take items from the school. At a later disposition hearing, the juvenile court adjudged Yesenia a minor under Welfare and Institutions Code section 602 and placed her on probation in the custody of her mother with numerous probation conditions. At that hearing, the court addressed the issue of restitution, noting the probation officer's social study report recommended that Yesenia pay only \$100 in restitution and a \$119 fine under Welfare and Institutions Code section 730.5. It set a restitution status review hearing to identify the total amount of fire-related damages and other losses sustained by the school and address whether Yesenia and the other offenders should be jointly and severally liable for those losses. The court in the meantime ordered as a condition of probation that Yesenia and her companions be jointly and severally responsible for an amount of restitution to be determined by the school.

Thereafter, the probation officer submitted a supplemental report recommending that Yesenia pay \$139,669 (\$120,000 to the San Diego Unified School District and \$19,669 to the school) in economic losses for fire damage sustained to the bungalow as well as for damaged and destroyed contents. At the ensuing restitution hearing, the court set the amount of restitution at \$139,669. It addressed the question of how to divide the minors' responsibility for restitution and whether they could be held jointly and severally liable for the damages, inviting the parties to submit briefing on that point. At the

continued restitution hearing, the court considered arguments of counsel and concluded that Edwin's acts were done in furtherance of the joint stealing exercise and because all of the minors benefitted from his acts, they would all pay and bear the consequences of those acts. It ordered \$139,669 in victim restitution to be paid jointly and severally by all three minors and their parents.² Yesenia filed the present appeal.

DISCUSSION

I. *Standard of Review*

We review the juvenile court's restitution order for abuse of discretion. (*In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1016.) A court abuses its discretion by acting contrary to law or failing to use a rational method that could reasonably be said to make the victim whole (*ibid*), or by making an order that is arbitrary, capricious or " ' " 'exceeds the bounds of reason, all of the circumstances being considered.' " ' " (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121 (*Carbajal*).)

² The court reasoned: ". . . I think it comes down to more of a civil-type question of causation. Are the damages [a] foreseeable, reasonably foreseeable consequence of these minors' actions? And I think that given the fact in this case we have the same victim, same course of conduct, same events, no different criminal intent. None of these three children intended to burn this place down. I do agree there is a separate act by one of them. I don't think that differentiates the ultimate liability. [¶] The acts by Mr. Orloff's client Edwin was done in furtherance – were done in furtherance of this joint exercise. That is, they wanted to steal as much stuff as they could from this place. It wasn't distinct and different. All three were to benefit from his acts. All three are going to pay and bear the consequence of his act."

II. *The Restitution Order is Not an Abuse of Discretion*

Yesenia challenges the juvenile court's victim restitution order on grounds it does not foster the purposes of restitution of rehabilitation and deterrence because it relates to an offense – the arson – in which she was not involved and for which she was not responsible. In making this contention, Yesenia appears to acknowledge her restitution order was imposed as a condition of probation. Citing *People v. Woods* (2008) 161 Cal.App.4th 1045 (*Woods*) and other authorities, she admits courts are vested with broad discretion to impose probation conditions including the payment of victim restitution for losses stemming from related criminal activity that is either uncharged or does not result in a conviction.³ However, she points out that the *Woods* court states this principle flows from the notion " 'that the granting of probation is not a right but a privilege' " subject to a defendant's acceptance or refusal, and from that she argues the rule does not apply to juvenile cases where the minor has no choice but to accept probation. Yesenia also argues the restitution order will actually hinder her rehabilitation by placing an insurmountable financial burden upon her when she hopes to attend college some day.

The People respond that the restitution order was reasonably related to the burglary to which Yesenia admitted since the bungalow was burned down during the course of that crime and Edwin's act in setting the paper on fire was to further their

³ Yesenia correctly observes that in a nonprobation setting, courts limit restitution awards to those losses arising out of the criminal activity that formed the basis for the defendant's conviction. (*Woods, supra*, 161 Cal.App.4th at p. 1049; *People v. Lai* (2006) 138 Cal.App.4th 1227, 1247; *People v. Percelle* (2005) 126 Cal.App.4th 164, 179.)

burglary. They also maintain that the order is reasonably related to the goal of deterring Yesenia's future criminality. They argue that *Woods, supra*, 161 Cal.App.4th 1045 does not base its holding on the fact that adult offenders can turn down probation, but on distinctions between Penal Code section 1202.4, authorizing restitution in nonprobation cases, and 1203.1, authorizing restitution in probation cases.

We agree with the People. Yesenia acknowledges that a restitution probation condition is proper if it is "reasonably related either to the crime of which the defendant is convicted or to the goal of deterring future criminality." (*Carbajal, supra*, 10 Cal.4th at p. 1123; accord, *In re I.M.* (2005) 125 Cal.App.4th 1195, 1209-1210.) Here, the juvenile court had a reasonable basis for concluding that Edwin assisted the burglary in this case by his use of the match, which lit the bungalow to permit the minors to take various items and ultimately started the destructive fire. Yesenia chose to participate in the burglary, climbing into the bungalow through the window and assisting the others in taking items. She does not challenge the amount of damage sustained by the school district and the school. The restitution order, though sizable, serves to make Yesenia aware of the consequences of her choice by compelling her to share responsibility for the activities in which she participated leading to the fire. (Accord, *In re I.M., supra*, 125 Cal.App.4th at p. 1210.) *In re I.M.* applied these principles to a juvenile offender, upholding a restitution order imposed on the defendant when he or she was only guilty of being an accessory after the fact to a murder and did not personally cause the victim's loss. (*In re I.M.*, at pp. 1209-1210.) Following *Carbajal*, the *I.M.* court explained: "That a defendant was not personally or immediately responsible for the victim's loss does not

render an order of restitution improper. 'California courts have long interpreted the trial courts' discretion to encompass the ordering of restitution as a condition of probation even when the loss was not necessarily caused by the criminal conduct underlying the conviction. Under certain circumstances, restitution has been found proper where the loss was caused by related conduct not resulting in a conviction [citation], by conduct underlying dismissed and uncharged count [citation], and by conduct resulting in an acquittal [citation].' [Citation.] . . . [T]he question simply is whether the order is reasonably related to the crime of which the defendant was convicted or to future criminality." (*Id.* at p. 1209, quoting *Carbajal, supra*, 10 Cal.4th at p. 1121.) The juvenile court did not abuse its discretion here in impliedly concluding the losses at issue here met this standard.

Yesenia's reliance on *Woods, supra*, 161 Cal.App.4th 1045 is not persuasive. *Woods* took its quote directly from *People v. Percelle, supra*, 126 Cal.App.4th 164, which in turn quoted *People v. Miller* (1967) 256 Cal.App.2d 348. In *Percelle*, the defendant was sentenced to state prison after he was convicted of numerous crimes but acquitted of one of two charged vehicle thefts, in connection with the failure to return a rental car that had been rented with another person's credit card number. (*Percelle*, 126 Cal.App.4th at pp. 168, 171, 178.) The trial court ordered the defendant to pay restitution to the owner of the credit card that was the subject of defendant's acquittal. (*Id.* at p. 178.) On appeal, the appellate court struck the order because the defendant had not been granted probation, and "in the nonprobation context, a restitution order is not authorized where the defendant's only relationship to the victim's loss is by way of a crime of which

the defendant was acquitted." (*Id.* at p. 180.) As *Woods* points out, the *Percelle* court also found no evidence the unauthorized charges to the victim's credit card were the result of any crime of which the defendant had been convicted. (*Woods, supra*, 161 Cal.App.4th at p. 1050.) *Percelle* focused on the language of Penal Code section 1202.4, holding it unambiguously stated the legislative intent that "the victim of a crime should receive restitution directly from any defendant *convicted of that crime.*" (*Percelle*, at p. 180.)

Because the defendant in *Percelle* was not granted probation but rather sentenced to state prison (as was the defendant in *Woods, supra*, 161 Cal.App.4th at p. 1051), we perceive the *Percelle* court's citation to *People v. Miller* and its observation about the rationale behind orders for restitution as probation conditions to be dicta. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 945, p. 986.) Likewise, the *Miller* court's statement was a conclusionary note in which the court essentially observed the defendant had forfeited of the argument by his failure to raise his contentions at the original probation hearing. (*People v. Miller, supra*, 256 Cal.App.2d at p. 356.) That comment was not the rationale for the court's holding that restitution as a valid probation condition "need not be limited to the direct consequences of the criminal acts of which a defendant is actually convicted." (*Id.* at p. 355.) For these reasons, we decline to adopt *Woods*' analysis to the extent it justifies the probation distinction on a defendant's ability to reject or accept probation.

Additionally, we disagree with Yesenia's argument that the restitution order does not foster the purposes of restitution or rehabilitation in her case. Relying on *In re*

Maxwell C. (1984) 159 Cal.App.3d 263, she argues in part that she would never have anticipated Edwin to cause a fire or expect to pay for the consequences of his conduct, and it is unreasonable to impose restitution for conduct she had "nothing to do with and for which another person pleaded guilty to and accepted the responsibility. . . ." *Maxwell C.* held that an order of restitution must be "directly related to the crime charged and must relate to acts by the accused which were committed with the same state of mind as the offense of which he was convicted in order that the statutory rehabilitative effect can take place." (*Maxwell C.*, at pp. 265-266; see also *In re I.M.*, *supra*, 125 Cal.App.4th at p. 1209.) But the California Supreme Court rejected the *Maxwell* court's rationale in *Carbajal*, *supra*, when it disapproved authority standing for the notion that trial courts should refrain from conditioning probation on restitution unless the act for which the defendant was ordered to make restitution was committed with the same state of mind as the offense of which he was convicted. (*Carbajal*, *supra*, 10 Cal.4th at p. 1126, disapproving *People v. Richards* (1976) 17 Cal.3d 614, 622; see also *In re I.M.*, at pp. 1209-1210.) *Maxwell C.* provides no basis to reverse the restitution order imposed in this case.

III. *Due Process*

Yesenia contends the juvenile court violated her due process rights when it imposed the restitution order without considering matters such as her age, indigence, and lack of prior offenses. Arguing the \$139,669 restitution order rose to the level of punishment, she states the excessiveness of the order warranted an inquiry into these

matters as well as the fact that Edwin pleaded guilty to the arson, in which she took no part.

Here, the juvenile court provided Yesenia with a restitution hearing at which she was made aware of the amount of restitution and had an opportunity to present evidence of her ability to pay. Indeed, her attorney filed a motion to limit or vacate restitution in which counsel pointed out Yesenia's age and argued her actions were not related to the damage. At the hearing, counsel and the court acknowledged Yesenia's age and her limited involvement in actually starting the fire. Further, counsel pointed out, "This is a 13-year-old little girl who has never had any prior offenses. This was her first offense." The record simply does not support the proposition that the court did not consider Yesenia's circumstances.

"Due process requires only that a defendant in [cases where a court orders restitution as a condition of probation] be afforded an opportunity to present evidence on the issue of his ability to pay." (*In re I.M.*, *supra*, 125 Cal.App.4th at pp. 1210-1211, citing *People v. Campbell* (1994) 21 Cal.App.4th 825, 831.) Because Yesenia had a restitution hearing and was afforded just such an opportunity, we ascertain no violation of her due process rights.

IV. *Welfare and Institutions Code Section 730.5 Fine*

Yesenia contends the juvenile court exceeded its statutory authority by imposing the \$119 fine under Welfare and Institutions Code section 730.5 without making a finding of her ability to pay the fine. The People respond that Yesenia waived her right to challenge that fine on appeal by failing to object to it at the restitution hearing.

Welfare and Institutions Code section 730.5 governs fines in juvenile matters, and states in part: "When a minor is adjudged a ward of the court on the ground that he or she is a person described in Section 602, . . . the court may levy a fine against the minor up to the amount that could be imposed on an adult for the same offense, if the court finds that the minor has the financial ability to pay the fine." A fine may not be imposed under this section without a finding of ability to pay. (See *In re Steven F.* (1994) 21 Cal.App.4th 1070, 1079-1080, [fine imposed under Welf. & Inst. Code, § 730.5 requires discussion of financial circumstances or a court finding of minor's ability to pay].)

Given the aforementioned statutory condition that the juvenile court make a finding of the minor's ability to pay before levying such a fine, we reject the People's waiver argument. As a general rule, only claims that are properly raised in the trial court below are preserved and reviewable on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 351-353.) However, that rule is subject to a narrow exception: an appellant may challenge the sentence on a claim not raised at trial when the court imposes an unauthorized sentence, that is, a sentence that cannot not lawfully be imposed under any circumstance in the particular case. (*Id.* at p. 354.) Here, the court had no discretion or authority to impose a Welfare and Institutions Code section 730.5 fine without a finding of Yesenia's ability to pay. Thus, the appellate claim was not forfeited.

The People do not argue that the record contains sufficient evidence to support an implied finding of Yesenia's ability to pay the \$119 fine, and we find none in the record before us. Absent an express finding that Yesenia has the ability to pay the Welfare and

Institutions Code section 730.5 fine, we modify the juvenile court judgment to strike that fine.

V. *Apprendi/Blakely Error*

Conceding that victim restitution is generally not considered punishment, Yesenia contends the \$139,669 restitution order should not fall within that general rule because it " 'produces severe consequences or a serious effect' " similar to the restitution order in *People v. Zito* (1992) 8 Cal.App.4th 736.⁴ Accordingly, she argues that the restitution order must be vacated because it was not determined under *Apprendi* and *Blakely* in that the facts necessary to impose such punishment should have been alleged in the accusatory pleading and found true beyond a reasonable doubt or admitted by plea. We disagree.

In *People v. Harvest* (2000) 84 Cal.App.4th 641, the court held that for double jeopardy purposes, victim restitution is not punishment but a civil remedy that a court is authorized to order in a criminal matter. (*Id.* at pp. 649-650.) The court applied the standards of *Hudson v. United States* (1997) 522 U.S. 93, 99, relied upon here by

⁴ *People v. Zito, supra*, 8 Cal.App.4th at 736 involved a challenge to a restitution order on ex post facto grounds. (*Zito*, at pp. 740-741.) In *People v. Young* (1995) 38 Cal.App.4th 560, the appellate court explained that *Zito* does not hold that restitution (to the victim or as a fine) is "always and invariably a form of punishment. To the contrary, restitution has traditionally been considered to be nonpunitive. [Citations.] It becomes operative as a form of punishment only where, in a specific procedural context, its imposition produces severe consequences of a serious effect." (*Young*, at p. 569.) Unlike *Zito*, no unique procedural context is presented here. Yesenia is simply being ordered to pay restitution in the amount required to compensate the school district and school for damages stemming from acts in furtherance of her burglary.

Yesenia: "The purpose of victim restitution is compensation, which does not involve an affirmative disability or restraint, and which has not historically been regarded as punishment. Victim restitution can, when developed in the context of a criminal sentencing, come into play only on a finding of scienter, but it does not necessarily require such – there is no barrier to the victim obtaining essentially the same relief, a civil judgment for money, outside the criminal process. The restitution statutes make no mention of scienter, and are separate from provisions specifying punishment for substantive offenses. [Citation.] Victim restitution does have an element of deterrence, but it is far less important than the goal and alternative purpose of providing compensation to a victim of crime. [Citation.] Because restitution is limited to actual and demonstrated economic loss, it can hardly be condemned as excessive to the stated purpose of compensation. [Citation.] Moreover, when these factors are considered in conjunction with the plain statutory language, there is nothing like 'the clearest proof' need to override the Legislature's patent intent that victim restitution is a civil remedy and not a criminal penalty." (*Harvest*, 84 Cal.App.4th at p. 650.) We agree with and adopt the *Harvest* court's reasoning on this point.

Because victim restitution is not a "penalty for a crime," it does not fall within the holdings of *Apprendi* or *Blakely*. (See *Apprendi*, *supra*, 530 U.S. at p. 490.) Furthermore, because the right to a jury determination of facts beyond a reasonable doubt only applies to a criminal penalty in excess of what a judge could otherwise impose based solely on the facts reflected in the jury's verdict or the defendant's admissions (*United States v. Booker* (2005) 543 U.S. 220, 232-233), Yesenia here cannot show any

constitutional violation even if we were to assume victim restitution is a criminal penalty. In the absence of an upper limit on restitution, Yesenia's reliance on *Blakely* and *Apprendi* is inapt. (Cf. *People v. Urbano* (2005) 128 Cal.App.4th 396, 405-406 [imposition of restitution fine within statutory range does not require jury findings beyond a reasonable doubt].) No violation of constitutional rights is shown in this regard.

DISPOSITION

The order is modified to strike the \$119 Welfare and Institutions Code section 730.5 fine. In all other respects the order is affirmed.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.